Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

MONICA M. McKENZIE, JEFFREY L. RUSSELL, ROGER LOWENSTEIN, BENITA KICHLER, RICHARD J. PACIULIAN, LUISITO L. LOPEZ, ARTHUR MINTZ, HOWARD SOBEN, DAVID ZISSER,

Petitioners,

versus

Hon. WILIAM H. REHNQUIST, CHIEF JUSTICE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, Hon. JUAN R. TORRUELLA, Hon. JOSEPH L. TAURO, Hon. JON O. NEWMAN, Hon. PETER C. DORSEY, Hon. DOLORES K. SLOVITER, Hon. EDWARD N. CAHN, Hon. J. HARVIE In WILKINSON III, Hon. W.EARL BRITT, Hon. HENRY A. POLITZ, Hon. WILLIAM H. BARBOUR, JR., Hon. BOYCE F. MARTIN, JR., Hon. THOMAS A. WISEMAN, JR., Hon. RICHARD A. POSNER, Hon. MICHAEL M. MIHM, Hon. RICHARD S. ARNOLD, Hon. DONALD E. O'BRIEN, Hon. PROCTOR HUG, JR., Hon. LLOYD D. GEORGE, Hon. STEPHANIE K. SEYMOUR, Hon. CLARRENCE A. BRIMMER, Hon. JOSEPH W. HATCHETT, Hon. WM. TERRELL HODGES, Hon. HARRY T. EDWARDS, Hon. JOHN GARRETT PENN, Hon. GLENN L. ARCHER, JR., Hon. GREGORY W. CARMAN,

Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

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59 pp

QUESTIONS PRESENTED FOR REVIEW

1. The First Amendment safeguards beyond the reach of governmental interference the constitutional freedoms to speech (advocacy), association, and to petition for redress of grievances. Inseparable and interwoven and with these First Amendment freedoms, this Court has held an attorney's opportunity to practice law is a constitutionally protected Privilege and Immunity. This Court has held geographical isolation or difficulty in supervising a nationwide bar membership does not justify discrimination in bar admission. Federal substantive law and procedure are uniform. Do United States District Court "local" rules that categorically grant *general* bar admission privileges to newly minted attorneys from the forum State, and categorically deny *general* bar admission privileges to highly qualified and experienced attorneys from outside the forum State — violate the First Amendment, the Equal Protection Clause, or the attorney's constitutionally protected Privileges and Immunities?

2. Congress has declared in 28 U.S.C. § 2071(a) that United States District Court "local" rules **shall** be consistent with Acts of Congress and the national rules. Congress has declared in 28 U.S.C. § 2072(b) that "local" rules **shall not** modify, abridge, or enlarge any substantive rights. Are federal district court "local" attorney admission rules that categorically enlarge the First Amendment liberties and Privileges and Immunities of forum State attorneys, and categorically modify and abridge the First Amendment liberties and Privileges and Immunities of experienced federal practice attorneys from outside the forum State, lawful?

3. Do "local" rules that are adopted by United States District Judges, that grant enormous federal substantive privileges to one State's attorneys that are denied to another State's attorneys, violate the Supremacy Clause, or the Full Faith and Credit Clause?

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OPINION BELOW

The United States Court of Appeals for the District of Columbia Judgment, entered without an Opinion and not reported, is set forth at Appendix, p. 1-3. The United States District Court for the District of Columbia Judgment and Order entering a Rule 12(b)(6) dismissal and denying petitioner's Motion for Summary Judgment are not reported, and are set forth at App. p. 4-16.

STATEMENT OF SUPREME COURT JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254. The decision of the United States Court of Appeals for the District of Columbia to be reviewed was entered November 24, 1999. A petition for rehearing en banc was timely filed. An order denying rehearing en banc was filed February 29, 2000. An order enlarging the time to file for certiorari review until July 28, 2000 was filed on March 11, 2000 by JUSTICE JOHN PAUL STEVENS.

STATEMENT OF THE CASE

1. Introduction

A citizen's right to associate and petition with counsel in all federal courts is Constitutionally based and expressly authorized by statute. 28 U.S.C. § 1654 (App. p. 18) The central question sought to be reviewed is the legality of those United States District Court "local" rules, that categorically grant *general* bar admission privileges to newly minted attorneys licensed in the forum State, and categorically deny *general* bar admission privileges to highly qualified and experienced attorneys licensed outside the forum State.

This Court in *Theard v. United States*, 354 U.S. 278, 281 (1957) recognized,

> "The matter was compendiously put by Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals. "`Membership

> in the bar is a privilege burdened with conditions' (*Matter of Rouss*, [221 N. Y. 81, 84, 116 N.E. 782, 783]). The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."

This Court in *Frazier v. Heebe*, 482 U.S. 641, 649 (1987), held "the location of a lawyer's office simply has nothing to do with his or her intellectual ability or experience in litigating cases in Federal District Court." (Emphasis added) This Petition for Certiorari raises the closely related question referred to and left unanswered in *Frazier v. Heebe*, namely, whether Federal District Court local rules that categorically discriminate, regardless of individual merit or need, against federal practice lawyers licensed outside the forum State have "anything to do with the lawyer's intellectual ability or experience in litigating cases in Federal District Court"? *Ibid.*

This question will be first viewed in light of this Court's analysis in *Frazier v. Heebe*. Recent public testimony denouncing these local rules by respected arms of the bar will be examined, and the challenged local rules will be shown to be the progeny of the despised Supreme Court decisions in *Dred Scott v. Sandford* 60 U.S. (19 Howard) 393 (1856) and *In re Lockwood*, 154 U.S. 116 (1894). This issue will then be filtered through the even more stringent "local" rule standards enacted by Congress after *Frazier v. Heebe* was decided. This issue will be directly examined in light of this Court's First Amendment jurisprudence concerning the freedoms of speech (advocacy), association, and petition for redress of grievances in a federal pubic forum. The challenged rules will be shown to be an unprincipled and violent invasion of our Constitution and our mother principles articulated in the Declaration of Independence.

This Court should exercise its inherent supervisory jurisdiction, as well as its statutorily delegated responsibility over federal rules and procedure, and grant review because of the nationwide reach of the questions presented that plumb the limits of District Judge rule-making and because of the

astonishing specter of impropriety flowing from the decisions below. The Court of Appeals one paragraph Judgment entered without Opinion and without oral argument affirms a non-published trial Court decision that was also entered without oral argument; and petitioners were denied leave to amend their 50-page Complaint. These procedural shortcuts in a case challenging Federal District Judge "local" rule-making power, and parochial hometown "local" attorney admission rules throughout our Union that are alleged to be unconstitutional, offends common notions of due process. The rule of men afraid of a superstitious taboo has trumped the rule of law. Petitioners submit the appellate Court's one paragraph secret Judgment in this First Amendment public forum case where our CHIEF JUSTICE and other federal judges serving throughout our Union are named defendants, is an admission by silence that the petitioners' arguments are unanswerable. Petitioners submit the challenged "local" rules are conspicuously outmoded and unlawful. In these circumstances, this Honorable Court has a public trust and fiduciary duty to grant *certiorari* and answer these questions presented.

2. The Petitioners, Respondents, and the Challenged "Local" Rules

The petitioners are eminent, ethically qualified, and experienced mobile federal practice attorneys. This Court has often recognized that *pro hac vice* admission is not equivalent to *general* admission. The petitioners who have been received into that ancient fellowship for something more than private gain, and who are instruments to advance the ends of justice, seek *general* admission and full Federal District Court equal bar membership *privileges*.

At the time the Complaint was filed, all of the petitioners lived and lawfully worked as attorneys in California.[1] Two of the petitioners have since moved out-of-

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[1] California Rule of Professional Conduct "1-100 (B)(1) Law Firm means: two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities." [defines "lawyers" as including out-of-state lawyers and members of State Bar]

state. MONICA M. McKENZIE was in-house corporate counsel for a publicly traded company. JEFFREY L. RUSSELL is a retired Asst. United States Attorney. ROGER LOWENSTEIN is a Harvard Law School graduate and former Chief Federal Public Defender for the District of New Jersey. BENITA KICHLER, was trademark counsel for a Fortune 500 company, overseeing 10,000 national and international trademarks. RICHARD J. PACIULAN is a patent lawyer admitted for over 20 years to the bar of the U.S. Patent and Trademark Office. LOUISITO L. LOPEZ is an immigration law specialist. ARTHUR MINTZ is a former bankruptcy receiver. HOWARD SOBEN is a tax specialists and corporate counsel for a charitable organization. DAVID ZISSER is a federal tax and bankruptcy law specialist.

The respondents are the individual members of the United States Judicial Conference. Except for CHIEF JUSTICE REHNQUIST, each of the respondents also wears a "second hat" as Chief Judge or representative of the Judicial Councils for the Circuits. These respondents are also sued in that representative official capacity. Congress, in 1988, delegated to the respondents an affirmative and continuous supervisory duty under 28 U.S.C. §§ 331-32 to review and superintend "local" rules to make certain they are in accordance with the rule-making standards set forth in 28 U.S.C. §§ 2071-72 as revised. This subject will be subsequently addressed in greater detail.

The petitioners in their Complaint have requested Declaratory Relief declaring that Federal District Court local rules that categorically prohibit out-of-state attorneys from *general* admission are unlawful. Petitioners have also requested Injunctive Relief barring further enforcement of the challenged rules. The trial Court held the petitioners have standing, or could demonstrate standing if permitted to amend their Complaint. The petitioners aver they are still being injured by the challenged "local" rules, facially and as applied. The petitioners also submit they have third party standing to assert the First Amendment rights of their clients to associate and petition. *Department of Labor v. Triplett*, 494 U.S. 715 (1990).[2]

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[2] This Court in *Triplett* reasoned, 494 U.S. at 720,

> When, however, enforcement of a restriction against the litigant prevents a third party from entering into a

The "local" attorney admission rules for the 93 United States District Courts generally fall into three categories. The first category authorizes *general* admission reciprocity to all licensed sister-state attorneys.[3] Petitioners do not challenge the "local" rules of these 29 District Courts. The second category is exemplified by the "local" rule of the United States District Court for the District of Columbia.[4] This "local" rule is challenged, and in pertinent part, declares out-of-state attorneys get *general* admission reciprocity in the Federal District Court for the District of Columbia, if District of Columbia local federal bar members get *general* admission reciprocity in the applicant's hometown Federal District Court. The petitioners were directly injured by this rule. The trial Court denied petitioners' application to appear through their chosen counsel, and refused to permit filing of their Complaint for almost two months. Petitioners were required to prove they could not find local lead counsel willing to champion this locally unpopular federal claim. These challenged rules are not merely procedural regulations; they impose substantive qualifications that handicap the constitutional and statutory right to petition the Federal District Courts.

The third category confines *general* admission to members of the bar of the forum State.[5] The majority of local attorney admission rules are in this challenged category. In the third type, there is a sub-category. Three out of the four United States District Courts for the Districts in California are in this group. This putative fellowship not only confines *general* admission to forum State attorneys, but goes further and categorically forecloses even *pro hac vice* admission, if the sister-state attorneys resides or works in the State of

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relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement), third-party standing has been held to exist.

[3] See App. Table 1 p. 20

[4] See App. Table 2 p. 20

[5] See App. Table 3 p. 21

California.[6] These rules do not leave open any alternative channel.

The petitioner instruments of justice are gagged and categorically barred from associating and petitioning with their clients regardless of individual merit or need, and thwarted from championing locally unpopular causes in United States District Courts that they pay for with their federal tax dollars. Our Union cornerstones "all men are created equal," and that there shall be "no taxation without equal representation," are trampled by these challenged rules that either fully ban or cripple access to United States District Courts.

3. The Decisions Below Ignore Material Facts That Demonstrate The Challenged "Local" Rules Are Arbitrary And Not Necessary, And They Prostrate The Standard Of Review This Court Applied In *Frazier v. Heebe*

This Court in *Frazier v. Heebe*, *supra*, 482 U.S. 641 (1987), in exercising its supervisory powers, over challenged Louisiana Federal District Court local rules, applied a two pronged heightened scrutiny "rational and necessary" standard of review. This Court held, "We find both [local rule] requirements to be unnecessary and irrational." *Id.* at 646. This Court reasoned, "Complete exclusion is unnecessary." *Id.* at 648. There is obviously no "necessary" prong in rational basis review.

This Court, as a matter of law, as previously mentioned held, "the location of a lawyer's office simply has nothing to do with his or her intellectual ability or experience in litigating cases in Federal District Court." *Id.* at 649. This Court also recognized that, "Rules that discriminate against nonresident attorneys are even more difficult to justify in the context of federal court practice than they are in the area of state court practice, where laws and procedures may differ substantially from State to State." *Frazier v. Heebe*, 482 U.S. at 647 n. 7 . And, "There is a growing body of specialized federal law and a more mobile federal bar, accompanied by an increased demand

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[6] See App. Table 4 p. 22

for specialized legal services regardless of state boundaries." *Ibid.*

Initially, the trial Court Opinion flagrantly misstates the central facts. It states incorrectly that there is no federal discrimination because,

> "Under the local rules challenged here, all lawyers of all states are presumably required to be members in good standing of the bar of the state in which the federal court sits." (emphasis in original) (App. p. 9)

This factual conclusion is untrue and bizarre; 29 federal district courts have adopted "local" rules that were cited to the trial judge that extend equal Privileges and Immunities, equal First Amendment freedoms, equal Full Faith and Credit, and *general* admission to all sister-state attorneys in good standing. Likewise, it is hard to fathom any "presumption" in the "you get reciprocity if we get reciprocity" challenged Federal District of Columbia local rule.

The decisions below, if truth and honesty is permitted, also whitewash facts that show that there is not any reasonable "competence" or "ethical" justification that would warrant categorical forum State membership as an essential precondition to Federal District Court *general* admission.

As to "competence," Congress, in enacting 5 U.S.C. § 500 (App. p. 18) and in ratifying national appellate rule FRAP 46 (App. p. 18) has explicitly declared the necessary qualifications and preconditions for practice before federal administrative agencies and in the United States Courts of Appeal. Membership in the bar of any single State is not an essential precondition. The doors of these federal fountains of justice are open to attorneys from every State. In a word, these Acts of Congress and national rules extend equal First Amendment freedoms, equal Privileges and Immunities, and equal "Full Faith and Credit."

As noted by this Court in *Frazier v. Heebe*, federal jurisdiction does not stop at the State boundary. Federal substantive law and procedure is uniform, supreme, and has little to do with the law of any single State except in diversity cases. Even in diversity cases, federal procedure is applicable,

and there can be a question of which State's law should be applied. Petitioners' specialized area of federal practice, in general, is not even tested on a bar exam. More particularly, studies by the United States Judicial Conference indicate that there is a direct competence correlation with experience, and the best measure of competence is experience.[7]

These facts illustrate there is no "competence" justification that would warrant the categorical granting of *general* admission *privileges* to newly minted attorneys forum State attorneys, and categorical rejecting of *general* admission *privileges* to experienced federal practice attorneys licensed outside the forum State. Experienced federal practice attorneys do not present a "clear and present danger" that would justify these "local" rule prior restraints in a federal public forum.

There is also no reasonable "ethical" justification that would warrant forum State bar membership as a categorical precondition for district court admission. The material facts whitewashed are as follows:

- This Court has squarely held geographical isolation or difficulty in policing a nationwide bar membership does not justify discrimination in bar admission. *See Barnard v. Thorstenn*, 482 U.S. 546 (1989)
- This Court has squarely held an attorney's opportunity to practice law is constitutionally protected Privilege and Immunity, and there is no reason to presume or conclude an out-of-state attorney will conduct his practice in a dishonest manner. *Barnard v. Thorstenn; Supreme Court of New Hampshire v. Piper* 470 U.S. 274 (1985).

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[7] "(N)o one has yet devised an examination which will test one's ability to be a courtroom advocate." *See Report and Tentative Recommendations of the Committee to Practice in the Federal Courts in the Judicial Conference of the United States*. 79 F.R.D. 187, 196. "Lawyers with previous trial experience are much more likely to turn in very good performances, and it permits the inference that experience improves the quality of trial performance." *Id.* at 196. There is a correlation between the quality of trial performance and the prior experience of the attorneys evaluated. 83 F.R.D. at 222.

- Federal courts are prohibited from relying conclusively on State findings as the basis for attorney discipline. *See* Federal Judicial Center, *Manual for Cooperation Between State and Federal Courts* (1997) p. 78-79 (citing the Theard doctrine, which holds although attorneys may be admitted via the State, they are not necessarily automatically terminated through the same channel).
- Even assuming the District Court wanted to refer the attorney to the forum State for ethical investigation, most States claim ethical jurisdiction over any attorney who works within the State, even if he or she is not locally admitted. For example, under California Rule of Professional Conduct 1-100 (D)(2)[8] (enacted in 1992), the State Bar of California has jurisdiction over any sister-state attorney working in California regardless of whether he or she is admitted in California.
- Likewise, the law is clear that a State has ethical jurisdiction over all of its attorneys regardless of where they work. *See U.S. v. Ferguson*, 54 F.3d 825 (D.C. Cir. 1995)(holding New Mexico ethics rule applies to a licensed New Mexico attorney working as an Assistant U.S. Attorney in Washington, D.C.) Therefore, the licensing State also has ethical jurisdiction regardless of the geographical location where the attorney is working.
- In *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990), this Court, in a unanimous decision, held the State Bar of California was equivalent to a "labor union," and that it had violated its members First Amendment rights. Subsequently, the entire State Bar of California discipline staff was shut down and sent home for wide spread abuse and criminal lobbying. It is plainly irrational for "local" rules to condition membership on a "labor union" that has been shut down for ethical violations, and also has been held by a 9-0 vote to have trespassed its members First Amendment rights.

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[8] "As to lawyers from other jurisdictions who are not members: These rules shall also govern the activities of lawyers while engaged in the performance of lawyer function in this state."

Furthermore, the decisions appealed also overlook the purpose and effect of the challenged "local" rules is anti-competitive. Economic protection is not a legitimate federal governmental interest. The District of Columbia local rule, i.e., you get reciprocity if we get reciprocity, demonstrates the sole justification for this rule is private gain and economic protection. A desire to grant a monopoly to members of the local bar is an illegitimate justification. *See FTC v. Superior Court Trial Lawyers Assn.* 493 U.S. 411 (1989)

> "(U)ltimately competition will produce not only lower prices, but also better goods and services.' *National Society of Professional Engineers v. United States,* 435 S. 679, 695 (1978). This judgment 'recognizes that all elements of a bargain — quality, service, safety, and durability — and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.'" *Trial Lawyers, supra,* 493 U.S. at 423.
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> . . .
>
> "That is equally so when the quality of legal advocacy rather, than engineering design, is at issue." *Id.* at 424.

The unreported trial Court decision and the one paragraph Court of Appeals Judgment also cast aside this Court's application of the "rational and necessary" standard of review. Instead, the trial Court applied the pure rational basis standard. It is self-evident this Court applied a heightened scrutiny "rational and necessary" standard, and not a rational basis standard. First, as noted above, there is no "necessary" prong in rational basis review. Second, *Frazier v. Heebe* was also filed under the First Amendment. *Id.* at 643 n. 1. This Court never reached the constitutional questions. Had this Court reached the constitutional questions, it would have been constrained to apply the strict scrutiny standard. The First Amendment in plain and unmistakable language makes clear the freedoms to speak as one chooses, and to associate with

whom one chooses, and to petition the Government for redress of grievances — withdraws the entire subject from the national authority. It is axiomatic that governmental interference in the guaranteed First Amendment freedoms to speech, association, and petition are subject to strict scrutiny review. Moreover, if rational basis review were applicable, the Bill of Rights could be swallowed whole anytime the government chooses. The Bill of Rights would be nothing but a solemn mockery. Yesterday's newspapers would have the same force as our Constitution.

Petitioners submit the challenged rules that ban or handicap access to United States Courts cannot pass the "rational and necessary" standard of review articulated by this Court in *Frazier v. Heebe*, 482 U.S. at 646, and they are thus unlawful. In an era of a global economy, multi-jurisdictional practice of law, mobile federal practice specialists, computers, e-mail, and electronic information, the challenged rules are as out of place as racial prejudice and courtroom spittoons.

4. The Decision Appealed Ignores Public Testimony That Vilifies The Subject "Local" Rules By Respected Arms Of The Bar: The Rules Are A Living Monument To The Pre-*Brown v. Board of Education* Era of Jurisprudence

Many respected commentators have publicly declared that the local attorney monopoly provided by the challenged local district court rules stain the integrity of federal bench and bar — and should be eliminated. The American Bar Association has officially recommended a policy of reciprocal admission in the federal district court. The ABA House of Delegates, almost five years ago in 1995, adopted the following formal conclusion and resolution #8:

> CONCLUSION — Given the global nature of law practice today, parochial local rules are inefficient, unduly costly to clients and/or lawyers and anti-competitive.
>
> BE IT RESOLVED, THAT the American Bar Association supports efforts to lower barriers to practice before U.S. District

> Courts based on state bar membership by eliminating state bar membership requirements in cases in U.S. District Courts, through amendment of the Federal Rules of Civil and Criminal Procedure to prohibit such local rules.[9]

This ABA House of Delegates resolution was served on the respondent United States Judicial Conference and accompanied by a report from Donna A. Killoughey, Chair of the ABA Section of Law Practice Management. The report emphasizes that local rules that require forum State bar membership as a condition to admission in the U.S. District Court are an "exclusionary and anti-competitive practice" that "inhibits competition, restricts lawyers from representing clients without incurring substantial cost of local counsel and drives up costs to clients."[10] There has been no Judicial Conference action taken with reference to this ABA recommendation that calls for amending these rules. Except, perhaps for filing it underneath the CHIEF JUSTICE'S (8-1) dissenting opinion in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). It is further widely reported in the legal newspapers the CHIEF JUSTICE hates his administrative duties with the Judicial Conference. There has been no publication of this proposed rule or opportunity to comment, which petitioners submit is a violation of the Judicial Conferences rules. Defense counsel below admitted that no action has been taken on the ABA's recommendation.

The National Bankruptcy Review Commission, established by the *Bankruptcy Reform Act of 1994*, has officially recommended national lawyer admission in bankruptcy courts.

Professor Charles Wolfram, the Reporter for the American Law Institute, concludes, "[T]o an observer, membership in the bar of the federal courts looks like the work

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[9] *See* Judicial Conference, *Working Papers of the Committee on Rules of Practice and Procedure* (Sep. 97) p. 37

[10] *Ibid.*

of petty fiefdoms of medieval Europe . . . Someday, sensibly admission to the federal courts will be federal in nature." Wolfram, *Modern Legal Ethics* (1986), § 15.2.4 p. 853. *See* also *New York County Lawyers' Association Report Of The Committee On The Federal Courts On Pro hac vice Admissions To the Federal Courts* 169 F.R.D. 390, 415 (1997)

> Conclusion: Stunning changes in technology and the increasingly national scope of federal practice have made the Association Rule an expensive and burdensome anachronism. Too many litigants and attorneys no longer recall the original reasons for the rule which now appears to many to be nothing more than judicially-sanctioned feather-bedding. These 'territorial restrictions on interdistrict competition among attorneys' which unjustifiably increase the cost of legal services to consumers by compelling unnecessary retention of additional lawyers' must be eliminated. The Association Rule gives rise to criticism by the general public about the legal process and clearly injures the image of both the bench and bar. For too long the legal community has not heeded the need for change. The case for eliminating the Association Rule is presently overwhelming. The time to act is now. (emphasis added)

The above comments denouncing the challenging local rules are just the tip of an iceberg of opposition by respected commentators and practicing specialists in federal law. The non-published one paragraph Judgment whitewashes these public testimonials by respected integral arms of the profession. This dysfunctional judicial decision-making stems from the recognition that the legal questions presented in this case are best addressed and answered by this Honorable Court. Additionally, as stated by Justice Oliver Wendell Homes, Jr., "it is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away

without your resenting the act and trying to defend yourself, however you came by it."[11]

The challenged rooted rules, however, are the offspring of the most reviled decisions in the history of this Court. In *Dred Scott v. Sandford* 60 U.S. (19 Howard) 393 (1856) it was held the "privileges and immunities" guaranteed to all citizens of the United States do not apply to Negroes. Accordingly, Dred Scott, who was born a Negro slave, was not permitted the "privilege and immunity" under the Constitution to sue in the courts of Missouri. In *Bradwell v. Illinois* 83 U.S. (16 Wall) 130 (1872), this Court held a State could refuse to admit a woman to the practice of law solely because of her sex. A concurring opinion of three Justices pointed to the differences between a male and female which proved conclusively that the right to practice law could not be claimed as a fundamental "privilege or immunity." *Id.* at 141-142. "[T]he paramount destiny and mission of a woman are to fulfil (sic) the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things." *Ibid.* Likewise, *In re Lockwood*, 154 U.S. 116 (1894), Belva Lockwood, an experienced female attorney, was denied admission to practice in the State of Virginia despite a statute which authorized admission to the bar of any person who had been admitted to the bar of another state. Following *Bradwell*, the Court held admission to practice law was not a "privilege or immunity" protected by the Constitution. These holdings are obviously from another era. The challenged local rules, however afford the petitioners the same constitutional rights as Dred Scott and Belva Lockwood. While these reviled Supreme Court decisions have been overturned, the challenged local rules remain as the putative federal law.

Supreme Court Justice Robert Jackson has been quoted, "the fact is the most important part of a judge's work is the exercise of judgment and that the law in a court is never better than the common sense judgment of the judge that is

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[11] *The Essential Holmes* p. 176 (edited by Richard A. Posner)(1992)

presiding."[12] It follows then that the law applied in the Federal District Court can never be better than the judgments of this Honorable Court. Thus, petitioners submit this Court should grant certiorari review and answer the questions presented.

5. The Decision Appealed Flies In The Face Of The Statutory Standard of Review For Local Rules Proscribed by 28 U.S.C. §§ 2071-72

After this Court's decision in *Frazier v. Heebe*, Congress subsequently (in 1988) substantially rewrote the law applicable to Federal District Court "local" rules. Congress proscribed an even more rigorous and exacting standard of review. As a result of the widespread opposition to the proliferation of balkanized "local" district court rules, Congress enacted *Title IV of the 1988 Judicial Improvements and Access to Justice Act* (Pub.L. 100-702). That law entirely revised 28 U.S.C. §§ 331, 332, 2071-2077. Congress found that there was "a proliferation of local rules, many of which conflict with the national rules of general applicability." *See* generally Siegel, *Commentary on 1988 Revision* (text after 28 U.S.C.A. 2071) p. 520-23. The main Congressional objections to the "local" rule making process was that they were often enacted without public notice or opportunity to comment from anyone other than the local bar; and there was virtually no opportunity for judicial review, as the judges who make the rules determine whether they are lawful. An affirmative mandatory supervisory obligation was placed on the respondents to periodically review all local rules to "for consistency with federal law," and to promote uniformity of procedures, and the expeditious conduct of court business. 28 U.S.C. § 331; *See* also 28 U.S.C. § 332(d)(4). There is no such thing as a rule becoming sacrosanct merely for having passed judicial council scrutiny the first time. (text after 28 U.S.C.A. 2071 at 522). It is subject to on-going scrutiny, as are all rules in existence on December 31, 1988. *Ibid.*

As rewritten and effective January 1, 1989, 28 U.S.C. § 2071(a) provides,

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[12] Eugene C. Gerhart, *America's Advocate: Robert Jackson*, p. 59.

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such [local] rules shall be consistent with Acts of Congress and rules of practice and procedure under Section 2072 of this title. (Emphasis added)

28 U.S.C. § 2072 (b) [also incorporated in 28 U.S.C. § 2071(a) by reference] in pertinent part provides,

> Such [local] rules shall not abridge, enlarge or modify any substantive right. (Emphasis added)

"Shall" means mandatory. There is no room for the exercise of discretion. The Congressional limit on power to adopt "local" rules makes perfect sense. Congress and the President in our tripartite republican system have the power to make the law. They stand for reelection and answer to the people. The role of federal judges is not to legislate, but to decide cases and controversies. In making "local" rules, Congress, by statute, has expressly preempted and deliberately curtailed the rule making authority of District Judges. It is plain these balkanized hodgepodge rules offend the intent of Congress to promote federal uniformity. Likewise, according to the Great Chief Justice John Marshall "the judicial opinions of all parts of the Union should be the same." 8 *The Papers of John Marshall* 148-49 (Chapel Hill: U. N.C. Press, 1995)

A. The Decision Appealed Is Fundamentally Flawed As The Challenged Local Rules Abridge, Enlarge, And Modify Constitutionally Protected Privileges and Immunities

In *Supreme Court of New Hampshire v. Piper*, *supra*, 470 U.S. 274 (1985), this Court held an attorney's opportunity to practice law is a "fundamental right" for a variety of reasons. The Court, in applying the strict scrutiny standard of review, explained:

> The lawyer's role in the national economy is not the only reason that the opportunity to practice law should be considered a "fundamental right." We believe that the legal profession has a noncommercial role and duty that reinforce the view that the practice of law falls within the ambit of the Privileges and Immunities Clause.[fn11] Out-of-state lawyers may - and often do - represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights.[13]

The 14th Amendment also has a textual Privileges and Immunities Clause. If an attorney's opportunity to practice law is constitutionally protected by Article IV § 2 Privileges and Immunity, it follows an attorney's opportunity to practice law is also incorporated and equally protected by the 14th Amendment Privileges and Immunities Clause. This Court in *Saenz v. Roe*, 526 U.S. 489 (1999) crushed the fiction arising from the 1870 *Slaughterhouse Cases*[14] there was a constitutional difference between Article IV § 2 Privileges and Immunities and 14th Amendment Privileges and Immunities. If the States cannot discriminate against citizens and residents concerning constitutionally protected Privileges and Immunities under the 14th Amendment, it follows that neither can District Judges. This Court has repeatedly held that even Congress cannot abridge 14th Amendment protections. The constitutional norm under the Privileges and Immunities Clause is comity. *Austin v. New Hampshire*, 402 U.S. 656 (1975).

The challenged "local" rules dishonor the norm of comity made mandatory by the "shall be consistent" language of 28 U.S.C. § 2071(a), and are thus unlawful. These challenged rules further contravene 28 U.S.C. § 2072(b) as they abridge and modify the Privileges and Immunities of out-of-state bar

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[13] *Id.* at 281

[14] 16 Wall (83 U.S.) 36 1873

members, and enlarge the Privileges and Immunities of forum State bar members. The District of Columbia rule, i.e. you get reciprocity, if we get reciprocity — abridges, enlarges, and modifies constitutionally protected Privileges and Immunities in one stroke. The First Amendment freedoms are also constitutionally protected Privileges and Immunities.

B. The Decision Appealed Is Fundamentally Flawed As The Challenged Local Rules Abridge, Enlarge, And Modify The First Amendment Freedoms To Speech, Association, And Petition For Redress Of Grievances In A Public Forum

The First Amendment freedoms are modified and infringed by the challenged local rules. Obviously, the privilege to petition the Federal District Court is not free, as only forum State attorneys are entitled to petition, and the attorneys from 49 States have to pay these attorneys a royalty fee to obtain limited partial petition rights. The local rules are statutorily unlawful as they enlarge the First Amendment rights of forum State attorneys, and modify and abridge the First Amendment rights of out-of-State attorneys. The same holds true with litigants who also have a First Amendment right to associate and petition.

The home-town decisions below also fail to examine or adhere to this Court's First Amendment jurisprudence. The subject trinity of sacred freedoms encompasses both protected *expression* and *conduct* in a public federal forum. The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The First Amendment is a prized American privilege to speak one's mind in all public institutions, and it includes the opportunity for vigorous advocacy. Id. at 269 The government can exclude a speaker from a traditional public forum, "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985). In the realm of private speech or expression, government regulation may not favor one speaker over another.

Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

It is difficult to fathom any rights with more constitutional protection than the trinity of separate and cumulative First Amendment freedoms asserted in this Petition; and petitioners' clients' First Amendment freedoms asserted via third party standing. The challenged local rules plainly encumber the First Amendment freedoms. The challenged local rules are plainly not "uninhibited, robust, and wide-open." The decisions below rocket over these issues, and do not even address the association, petition, and third-party issues.

Last term, *in United States v. Playboy Entertainment Group, Inc.*, 529 U.S. ___ (2000), this Court struck down a Congressional statute that required cable television operators who provide channels primarily dedicated to sexually oriented programs either to fully scramble or otherwise block those channels or to limit their transmission to hours when children are unlikely to be viewing. All nine justices agreed that the speech involved was defined by its contents, and the challenged law was a "content" based restriction. That is the speech involved applies only to channels dedicated to "sexually explicit adult programming or other programming as defined as indecent." All nine justices agreed that the standard of review was strict scrutiny, including the less restrictive alternative test, and that the government had the burden of proof. The Court split as to whether that strict scrutiny test had been met. As stated in the majority opinion, "Laws designed or intended to suppress or restrict specific speakers contradict basic First Amendment principles." (emphasis added) *Id.* at __. In other words, as again elucidated in *Playboy*, the First Amendment applies to the message and the messenger. Speaker discrimination is a son of "content" discrimination. The challenged rules are content and speaker discrimination as they are "designed or intended to suppress or restrict specific speakers" *Ibid.*, like petitioners and others similarly situated. As such, the challenged rules "contradicts basic First Amendment principles." *Ibid.* It is plain that if restrictions placed on sexually explicit programming must pass strict scrutiny review, restrictions placed on petitioner members of the bar must also pass strict scrutiny review.

Petitioners' submit these challenged local *general* admission rules are "overbroad." They constitute either "speaker discrimination" or "viewpoint discrimination." Only local attorneys are fully privileged to speak or state their views. The petitioners do not present a "clear and present danger" that would justify this kind of "speaker discrimination" and "prior restraint" in a public federal forum.

Additionally, last term in *California Democratic Party v. Jones*, 530 U.S. ____ (2000), this Court held that California's blanket primary violates the political party's First Amendment right of association. There, as in this petition, the challenged local rules force petitioners to adulterate their selection process, by forcing association to persons otherwise unaffiliated, and this compelled association is unlawful as it changes the party's intended message and messenger.

Similarly, last term in *Boys Scouts of America v. Dale*, 530 U.S. ____ (2000), this Court held New Jersey's public accommodation law that supported a gay scoutmaster violated the Boys Scouts' First Amendment right of expressive association. This opinion written by CHIEF JUSTICE REHNQUIST reaffirmed the principle that forced membership is unconstitutional if the person's presence affects in a significant way the group's ability to advocate public or private viewpoints. In the instant petition, the challenged local rules affect in a significant way both the petitioners' ability to advocate public or private viewpoints, and their First Amendment rights to associate and petition for redress of grievances. Following *California Democratic Party* and *Boy Scouts* the challenged local rule forced association and petition is unlawful, because the rules cannot pass a narrowly tailored compelling state interest test. CHIEF JUSTICE REHNQUIST'S majority opinion in Boy Scouts is irreconcilable with the putative defense of the challenged local rules asserted by his counsel.

Additionally, this Court in First Amendment jurisprudence, in conjunction with the Equal Protection Clause, has ruled that classifications that discriminate in the ability to exercise First Amendment rights are not subject to rational review, but instead are subject to strict scrutiny review. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972). The challenged local rules discriminate in the ability to exercise

First Amendment rights because forum State attorneys can speak (advocate), associate with whom they choose, and petition on behalf of their clients and associates, and other federal practice specialists from outside the forum State cannot. Following *Mosley*, once a forum is opened up to assembly or speaking by some favored members of the bar, government may not prohibit others members of the bar from assembling or speaking or petitioning, without passing a strict scrutiny standard of review.

The suggestion petitioners can associate and petition in other public forums and federal courtrooms, they just cannot associate and petition in the subject district courts, shrinks petitioners, as well as their client's and associate's, most sacred First Amendment rights — into cheap trinkets. One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place. *See Schneider v. United States*, 308 U.S. 147, 163 (1939). This Court has "consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired." *California Democratic Party, supra, 530* U.S. at ___.

Petitioners submit the challenged local rules cannot pass statutory review because they modify and enlarge First Amendment rights. The challenged local rules also cannot pass First Amendment strict scrutiny review.

C. The Decision Appealed Is Fundamentally Flawed As The Challenged Local Rules Abridge, Enlarge, And Modify Rights Protected By The Supremacy Clause

The decisions below conspicuously fail to address the petitioners' argument that the subject local rules violate the Supremacy Clause. In *McCullough v. Maryland*,[15] it was held the Supremacy Clause precludes a state from levying a tax on the operations of the United States government. This Court has held that "possessions, institutions and activities of the Federal Government itself in the absence of congressional consent are not subject to any form of state taxation."[16] Congress has

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[15] 17 U.S. (4 Wheat) 316 (1819)

[16] *United States v. Allegheny County*, 322 U.S. 164, 176 (1944)

specifically declared in 28 U.S.C. §§ 2071-72 that "local" rules shall be consistent with national rules and Acts of Congress. The *privilege* to use federal administrative agencies and appellate courts are not conditioned on the payment of local bar user fees. The challenged "local" rules violate the Supremacy Clause because they condition the *privilege* to petition the federal district court on the payment of local bar taxes. Local Federal District Judges in the absence of Congressional authorization do not have the authority to "tax" or place any encumbrance on the use of the federal courthouse. Federal District Courts obviously do not have the right to condition federal bar membership on owning local property in the forum State. It follows then, that the challenged local rules, which add forum State conditions to exercise federal rights, violate the Supremacy Clause.

D. The Decision Appealed Is Fundamentally Flawed As The Challenged Local Rules Are Inconsistent With 5 U.S.C § 500, FRAP 46, And Title VII

The challenged local rules that confine bar admission to lawyers of one State, or some other limited reciprocity, are further inconsistent with numerous other Congressional statutes. Neither 5 U.S.C § 500(b) nor FRAP 46(a) restrict bar membership to the lawyers of any one State. Instead, as the Constitution is color blind, Congress has affirmatively opened the doors to the federal court to merit and bar members from each and every State.

The challenged Federal District Court local rules are inconsistent with 5 U.S.C § 500 and FRAP 46 because they add substantive qualifications that were not imposed by Congress. It is plain that "local" rules cannot lawfully add conditions to those expressly stated by Congress. In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), the State of Arkansas attempted to impose term limits on federal elected officials. This Court held the State, even by way of State constitutional amendment, does not have the power to directly or indirectly add to the qualifications prescribed in the Constitution. By parallel reasoning, it follows Federal District Court local rules cannot add to, or modify, the norm of comity expressly prescribed by Congress in enacting 5 U.S.C. 500 and in affirming national rule FRAP 46.

Congress, in enacting 28 U.S.C. §§ 2071-72, has expressly stripped district court judges of the ability to modify its Acts. The Congressional mandate is that "local" rules shall be consistent with Acts of Congress and the national rules of practice and procedure." Thus, the challenged local rules are statutorily unlawful as they add and modify qualifications to those expressly declared by Congress, and they enlarge the substantive rights of forum State attorneys.

The challenged rules further trespass the Title VII Regulations. Contrary to the conclusion of the trial Court, Title VII is applicable to all federal licensing. Congress, acting through the E.E.O.C., has specifically concluded that there is a need for uniform federal selection in licensing and certification.[17] An express Congressional purpose of Title VII is to apply to federal licensing.[18] Title VII applies to any selection procedures for any employment, membership or licensing decision.[19] Under Title VII Part 1607, when two or more selection procedures apply, and are available for the same purpose, the selection procedure that is the least restrictive alternative applies.[20] Title VII is interpreted broadly to reach all disparate or unequal treatment selection procedures.[21] The local rules for admission obviously concern federal licensing and certification. There is no business necessity for the challenged disparate federal licensing procedures. The decisions below, by preconceived design, whitewash all of this law without any explanation. There is not an atom of difference between admission rules and federal licensing opportunities that discriminate based on outdated notions of race or gender, and the challenged local rules that stereotype based on outdated notions of which State in our nation the attorney originates.

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[17] *See* App. Table 5 p 22. ; 29 CRF § 1607-*UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES* (1978); 29 CRF § 1607.1 *Statement of purpose.*

[18] *See* App. Table 5 p. 23 ; 29 CRF § 1607.1 B -- *Purpose of guidelines.*

[19] *See* App. Table 5 p. 23 ; 29 CRF § 1607.2 B -- *Employment decisions*

[20] *See* App. Table 5 p 24 ; 29 CRF § 1607.3 *Discrimination defined.- Relationship between use of selection procedures and discrimination.*

B. Consideration of suitable alternative selection procedures.

[21] *See* App. Table 5 p. 23 ; 29 CRF § 1607-11 *Disparate treatment,*

6. The Trial Court's Application Of The Rational Basis Standard of Review Is Clearly Erroneous, And The Decision Appealed Relies On Law That Is Not Relevant Or Is Facially Flawed

The only Supreme Court decision the trial Court relied upon was *Leis v. Flynt*, 439 U.S. 438, 443 (1979), recognizing "The Constitution does not require that because a lawyer has been admitted in one state; he or she must be allowed to practice in another." (App. p. 9) *Leis v. Flynt* is not applicable, however, because it was not decided under the First Amendment, the Sixth Amendment, or the Privileges and Immunities Clauses. *Leis v. Flynt* is also inapplicable because it predates *Supreme Court of New Hampshire v. Piper*, *Frazier v. Heebe*, and the 1988 Judicial Improvements Act. Moreover, *Leis v. Flynt* has been overruled *sub silentio* in virtually every circuit.[22] This Court has also subsequently squarely held it is unconstitutional to grant an official "unfettered discretion to deny a permit application." *City of Lakewood v. Plain Dealers Publishing Company* 486 U.S. 750, 108 S.Ct. 2138, 2152 (1988) In essence, JUSTICE JOHN PAUL STEVENS dissent in *Leis v. Flynt*, has in 21 years superceded the majority.

Additionally, the First Amendment, Supremacy Clause, and 1988 Judicial Improvement Act claims presented in this case are one of first impression. The subject Federal District Court rules have never been challenged or examined in light of these claims by any federal court anywhere in a published decision. The trial Court summarily dismissed these claims by applying a rational basis standard of review: Despite the obvious fact that rational basis standard of review flies in the

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[22] *See U.S. v. Childress*, 58 F.3d 693, 736 (D.C.Cir. 1995)("The deprivation of his counsel of choice would entitle [petitioner] to a reversal of his conviction as a matter of constitutional right.") Accord *United States v. Ries*, 100 F.3d 1469 (9th Cir. 1996) *cert. denied.* 117 S.Ct. 2526 (1997)(held a defendant's right to the counsel of his choice includes the right to have an out-of-state lawyer admitted *pro hac vice.*"); *Schlumberger Technologies, Inc. v. Wiley*, 113 F.3d 1553 (11th Cir. 1997)(held binding circuit precedent requires a showing of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the district court in order to justify the denial of an applicant's pro hac vice admission.)

teeth of the "shall be consistent," and "shall not abridge, modify, or enlarge" conditions made mandatory by 28 U.S.C. §§ 2071-72. The rational basis standard for local rules has been supplanted and expressly preempted by Congress: Not to mention the Constitution.

The trial Court also applied the rational basis standard, and departed from the heightened scrutiny applied in Piper and *Frazier*, based on the decision in *Giannini v. Real*, 911 F.2d 354 (9th Cir. 1990) *cert. denied* 498 U.S. 1012, (1991), and other similar earlier circuit court decisions. The trial Court's ostrich like reliance on *Giannini v. Real*, cited ten times as the basis for this decision, is misplaced for several reasons. That decision entered ten years ago, was not argued or decided under the First Amendment, Supremacy Clause, or the arguments submitted in this case. That case was decided before *Saenz*, and not under the 14th Amendment Privileges and Immunities. There would never be any advance in civil rights law if Courts did not incorporate the most recent decisions in their analysis; or if attorneys upon losing a case were thereafter barred from arguing a similar case.

Equally important, *Giannini v. Real*, is facially wrongly decided. This case was decided on May 8, 1990, yet it cites the outdated law, as it existed prior to the 1988 amendments to 28 U.S.C. § 2071-72. *See* 911 F.2d at 360 where the Ninth Circuit, in Section B, analyzes the issue under the Rules of the Supreme Court. Compare that to 28 U.S.C.A. § 2071 and the immediately following *Commentary on 1988 Revision* by the reporter David D. Siegel, p. 521;

> ". . .in the 1988 amendment and its reference to the Supreme Court in the second sentence was struck out and a reference to § 2072 substituted. The change . . .adopted with the district courts primarily in mind, requires rules promulgated on the authority of § 2071 to conform to the requirements of § 2072 instead of merely to rules promulgated by the Supreme Court."

There is an enormous difference between the law as amended effective January 1, 1989, both in language and intent,

and the prior law denounced by Congress that was relied upon by the Ninth Circuit. (And again below.) This Ninth Circuit misfeasance in relying on the outdated law in 1990 that Congress expressly disapproved and denounced by enacting a plethora of statutory revisions proves beyond any doubt that *Giannini v. Real* was wrongly decided and it is not applicable to the instant case in view of the 1988 Amendments to 28 U.S.C §§2071-72. In a word, the decision in *Giannini v. Real*, is not only factually and legally distinguishable, it was facially flawed and outdated the day it was filed.

ARGUMENT

The Court Should Exercise Its Supervisory Power And Grant Review Because The Judgment Entered Without An Opinion Undermines The Integrity Of The Federal Bench And Bar, And This Case Presents An Important Question Of Federal Law That Cannot Go Unanswered Without Causing Further Litigation And Attack On The Federal Judiciary

Review should be granted as the questions presented in this case concern a usurpation of the Congressionally required uniformity with insidious encroachments on the cornerstones our American birthrights. These founding first principles include: all men and women are created equal; there shall be no taxation without equal representation; that our Union is one of checks and balances; that each citizen shall be free to speak and advocate as he thinks and to associate with whom he chooses, and shall be entitled to equal privileges; that the government shall not interfere with the people's sacred right to petition the government for redress of grievances; that merit not special privileges will be its guiding principle; that our government is of the people, for the people, and by the people – and not one of special interests.

Each and every one of these founding principles is being shorn by the challenged rules. Attorneys are not treated equally. Petitioners pay with their federal tax dollars for the federal courts, and the justice dispensed therein, yet they are denied the right to equal representation and participation. They are denied the equal privilege to check and balance the

pestilential growth of local partisan privileges. The challenged rules grant *special privileges* not *equal privileges*. Merit is not the touchstone. Local primogeniture is the touchstone.

This Court has already stated the challenged federal rules are "difficult to justify." Thirteen years ago, this Court recognized that, "Rules that discriminate against nonresident attorneys are even more difficult to justify in the context of federal court practice than they are in the area of state court practice, where laws and procedures may differ substantially from State to State." *Frazier v. Heebe*, *supra*, 482 U.S. at 647 n. 7. At that time fax machines were just becoming popular and the computer information age was in its infancy. By contrast, in this new millennium, 24-7 instant DSL internet access to all state and federal statutes, cases, rules, and regulations is available by mouse point and click. Many commentators have suggested that the challenged "local" rules are "feather-bedding" or from the "feudal" era and should be eliminated. This Court should not continue to let a hardening of the judicial arteries sacrifice our citizens' lifeblood in this electronic information age.

This Court should further grant review as this case is based on a nationwide constitutional injury that breeds a nationwide disrespect for the bench and bar. Petitioners, as members of the bar have been received into that ancient fellowship for something more than private gain. They have conducted themselves professionally and honorably in conformity with their obligation to champion locally unpopular causes and vindicate federal rights. They validly could have named each and every JUSTICE of this Court as a defendant in this action. They chose to not embarrass this Court, and start an ignoble precedent wherein Supreme Court JUSTICES are named as supervisory defendants in federal district court local rule challenges. The petitioners also have not yearned for the occasion to sue the Judicial Conference or Judicial Circuits for the opportunity to earn a living and compete in the race for life. However, this is the year 2000. The petitioners are mobile specialists in federal law. They have no other choice but to seek the necessary reform other than by way of litigation. The Judicial Conference doesn't even have a proposed rule in the pipeline, despite five years ago being notified of the need for change by the American Bar Association. The secret decision

of the D.C. Circuit further illustrates that changes in "local" rules are not going to by made by local judges.

This Court should further grant review as the petitioners have not been provided a full and fair opportunity to present their case to an open forum. The petitioners requested and were repeatedly denied the opportunity for oral argument in both the trial and appellate courts. Even Dred Scott and Belva Lockwood were given an opportunity to appear and be heard, and to have their claims decided in a published decision. In this case, Federal District Court rules that predate *Brown v. Board of Education* have been rubber-stamped in a single paragraph, without oral argument, and without a written appellate opinion. This is a significant glaring departure from the rule of law that warrants review.

This Court should grant review because its very purpose is to provide a supreme judicature where error and local partiality will ultimately be corrected. Harvard professor and world-renowned scientist, Edward O. Wilson, in his book *CONSILIENCE – The Unity of Knowledge* (1998 Vintage Books), writes

> Contract formation is more than a cultural universal. It is a human trait as characteristic of our species as language and abstract thought, having been constructed from both instinct and high intelligence. ..., we know that contract formation is not simply the product of a single rational faculty that operates equally across all agreements made among bargaining parties. Instead, one capacity, the detection of cheating is developed to exceptional levels of sharpness and rapid calculation. Cheater detection stands out in acuity from mere error detection and the assessment of altruistic intent on the part of others. It is furthermore triggered as a computation procedure only when the cost and benefits of a social contract are specified. More than error, more than good deeds, and more even than the margin of profit, the possibility of

> cheating by others attracts attention. It excites emotion and serves as the principal source of hostile gossip and moralistic aggression by which the integrity of the political economy is maintained. Id. at 186-87.

Petitioners, if truth and candor can be forgiven — maintain the local rules as well as the secret decision appealed — is cheating. This cheating is beneath the integrity of all federal courts. Truth and justice are first principles in all human affairs. The decision appealed is untrue and unjust because it does not disclose or review the facts and law that have been submitted. It has been said that injustice is of two kinds. One kind is by those who directly commit an injustice. The second is by those who have a duty to protect others from injustice, and who shrink from that duty. Both of these injustices are merged in the present petition. This is the very worst injustice because when injustice occurs in the court, there is no justice. When inequality occurs in the courts, there can be no equality.

This Court has a public trust: And by definition a fiduciary duty. In the famous words of Justice Cardozo, "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." The decision appealed cannot be cited as precedent because it is nonpublished. These issues and the legal arguments submitted are not going to magically disappear. In the words of President Truman, "the buck should stop here" with this Honorable Court, as this Court has the ultimate supervisory responsibility.

Counsel for CHIEF JUSTICE REHNQUIST and the respondents will request that this Honorable Court disregard its public trust and deny review. Defense counsel's request parsed to its core is that this Court should continue the "code of silence." Defense counsel's argument is the A.B.A. endorsement of federal district court reciprocity, and the other denunciations of the challenged "local" rules by respected arms of the bar, need not be held up to the antiseptic noonday sunlight of the public square. Defense counsel's argument is that this Court should place its respect for and friendship with the CHIEF JUSTICE and its fellow judges above its oath of

office and the Constitution. Defense counsel's argument, in principle, is this Court should act as a Star-chamber; Judge made rules like King made rules should be immune from review.

This Court should reject defense counsel's claims because this case presents a pervasive inequality antithetical to the core principles of our American creed. These questions cry out for an answer by this Honorable Court. Petitioners submit, additionally, that if their arguments are invalid, and this Court believes the challenged rules should be affirmed, than this Court should grant review and publish its reasons and holding.

This Court has an obligation to discharge its high duties with such ability, firmness, and moderation, as to command the respect, and retain the confidence of our nation. We must be able to believe in the spotless purity of the judges of this sacred tribunal. A failure to exercise this Court's supervisory responsibility is unthinkable as it will impair the dignity of this Honorable Court, and foment further direct assault on this altar of justice. If review is not granted, these claims will necessarily be pressed with increased devotion and fervor. If review is not granted, this Court will be affixing the seal of approval on inherently unequal *privileges*, unequal First Amendment rights, and secret decisions, when 220 years of judicial precedent establish that secrecy is not congenial to truth-seeking, and that no man can be a judge in his own case.

For all of the foregoing reasons, the Petitioners request this Honorable Court grant certiorari review, emancipate federal practice attorneys from the chains of slavery, and invalidate Federal District Court local *general* admission rules that do not cohere with 5 U.S.C. § 500(b) and FRAP 46(a).

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No. 99-5005

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Monica M. McKenzie, et al.,
Appellants

v.

William H. Rehnquist, Hon., Chief Justice of the Judicial Conference of the United States, et al.,
Appellees

November 24, 1999, Filed

SUBSEQUENT HISTORY:
Reported in Table Case Format at: *1999 U.S. App. LEXIS 37926.*

PRIOR HISTORY:
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. 97cv01792.

DISPOSITION:
Affirmed.

COUNSEL:
For MONICA M. MCKENZIE, JEFFREY L. RUSSELL, ROGER LOWENSTEIN, BENITA KILCHLER, RICHARD J. PACULIAN, LUISITO L. LOPEZ, ARTHUR MINTZ, HOWARD SOBEN, DAVID ZISSER, Plaintiffs -

Appellants: Joseph R. Giannini, Law Office of Joseph Giannini, Los Angeles, CA.

For WILLIAM H. REHNQUIST, JUAN R. TORRUELLA, JOSEPH L. TAURO, JON O. NEWMAN, PETER C. DORSEY, DOLORES K. SLOVITER, EDWARD N. CAHN, J. HARVIE WILKINSON, III, W. EARL BRITT, HENRY A. POLITZ, WILLIAM H. BARBOUR, JR., BOYCE F. MARTIN, JR., THOMAS A. WISEMAN, JR., RICHARD A. POSNER, MICHAEL M. MIHM, RICHARD S. ARNOLD, DONALD E. O'BRIEN, PROCTOR HUG, JR., LLOYD D. GEORGE, STEPHANIE K. SEYMOUR, CLARRENCE A. BRIMMER, JOSEPH W. HATCHETT, WM. TERRELL HODGES, HARRY T. EDWARDS, JOHN GARRETT PENN, GLENN L. ARCHER, JR., GREGORY W. CARMAN, Defendants - Appellees: Wilma Antoinette Lewis, U.S. Attorney, U.S. Attorney's Office, John Crawford Hoyle, Special Counsel, David William Ogden, Acting Assistant Attorney General, Peter Jeremy Smith, U.S. Department of Justice (DOJ), Washington, DC.

JUDGES:
BEFORE: Silberman, Henderson, and Tatel, Circuit Judges.

OPINION:

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. The court has determined that the issues presented occasion no need for an opinion. See Fed. R. App. P. 36; D.C. Cir. Rule 36(b). It is

ORDERED and ADJUDGED that the district court's order filed July 30, 1998, be affirmed. With respect to appellants' challenges to the local rules in the California district courts, the district court's order is affirmed substantially for the

reasons stated therein. With respect to appellants' challenges to the local rules in the remaining states, appellants have not met their burden of clearly alleging facts that would establish standing to challenge those local rules. Appellants failed to allege an actual injury with respect to these district courts' rules. See *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992).*

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

97cv01792.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Monica M. McKenzie, et al.,

v.

William H. Rehnquist, Hon., Chief Justice of the Judicial Conference of the United States, et al.,

Filed 7/30/98

MEMORANDUM AND ORDER

Ten California attorneys bring this action against the Judicial Conference of the United States, seeking, as they put it, declarative relief holding that 'local' United States District Court general admission rules that are adopted under 28 U.S.C.§ 2071, that deny reciprocal general admission to sister-state attorneys are unlawful as they are not consistent with the national rules and Acts of Congress. Compl. ¶ 1 (emphasis in original)

In other words, as the Court understands it, plaintiffs object to the local rules of the various United States district courts throughout the country that require membership in the bar of the state wherein they sit as a condition to admission to practice before them en a regular (as opposed to a pro hac vice) basis (hereinafter the local rules). Plaintiffs maintain [that] the challenged 'sweetheart' federal judicial favoritism in access to the United States District Courts are an anachronism antithetical to the federal court's jurisdiction and obligation. Compl. ¶

The case is presently before the court on dispositive cross— motions. The Court finds no material facts to be in dispute.[1]

I.

For complaint is drawn in nine counts, alleging, - successivaly, that the offending local rules are in violation of: (1) 28 U.S.C. §§ 331, 332, 2071; (2) 28 U.S.C. §§ 331, 332, 2072; (3) the First Amendment; (4) Title VII of the Civil Rights Act of 1964 42 U.S.C. SS 2000e to 2000e—17; (5) the Equal Protection clause; (6) the Fifth Amendment Due Process Clause; (7) the Fifth Amendment Right to Property; (8) the Right to Travel; and (9) the Full Faith and Credit Clause. A ruling in their favor en any one count, according to plaintiffs, would entitle them to the relief prayed.

Regardless of the merits of plaintiffs' arguments, plaintiffs have not adequately demonstrated that any one of them has standing to challenge the local rules of any district courts other than, possibly, those in California. Plaintiffs have not alleged that any other federal court has denied any plaintiff admission to its bar. Nevertheless, assuming that one or more plaintiffs could show standing if leave to amend the complaint were given, the Court will address the merits of each count.[2]

II.

Counts I and II (Violation of 28 U.S.C. §§ 2071-2)

Counts I and II Allege violations of 28 U.S.C. §§ 2071 and 2072, respectively. Section 2071 requires that local federal court rules be consistent with Acts of Congress and rules of practice and procedure prescribed (by the Supreme Court) under section 2072.' Pursuant to § 2072, local rules 'shall not abridge, enlarge or modify any substantive right.'

Plaintiffs fail, however, to cite a single federal statute or rule with which any challenged local district court rule is inconsistent. Instead, plaintiffs claim that the local rules violate the "spirit" of a federal rule of appellate procedure, a federal statute, and an executive order.

First, plaintiffs contend that the local rules are inconsistent with Pad. R. App. p. 46(a), which provides that an attorney who is a member of 'the highest court of a state . . -is eligible for admission to the bar' of a court of appeals.' As is apparent on its face, however, Rule 46(a) clearly has no application whatsoever to the district courts.

Similarly, plaintiffs claim that the local rules are 'directly inconsistent' with 5 U.S.C. § 500(b), which permits an attorney in good standing in any state to practice before any 'federal administrative agency.' Once again, that statute is clearly inapplicable to federal district courts.

Finally, plaintiffs 'contend that the local rules violate Executive Order 11478, which prohibits discrimination in personnel actions 'affecting employees or applicants for employment . . . in the judicial branch.' Obviously, attorneys applying for admission to the bar of a federal district court are not potential. 'employees' of the court and, therefore, are not covered by Executive Order 11478.

Count III (First Amendment)

Count III alleges a violation of plaintiffs' First Amendment rights. Plaintiffs contend that '(t)he challenged 'local' federal rules 'directly' burden the (p)laintiffs(') inextricably intertwined First Amendment right to speech, association, and petition.' See Reply Mem. in Supp. of Mot, for Summ. J., at 18.

Plaintiffs then expend considerable effort arquing that

defendants do not have any "compelling interest' that would justify infringing their First Amendment rights, and that the challenged local rules are overbroad. Without citation or further explanation, plaintiffs simply observe that they are 'attorneys with fundamental First Amendment rights,' as assuredly they are.

Courts have, of course, recognized a fundamental right of access to the courts, under due process, equal protection, or First Amendment rationales. *See Bieregu v. Reno*, 59 F.3d 1445, 1452—54 (3d Cir. 1995); *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1427 n.7 (8th Cir. 1986). But insofar as actually addressing the court as an advocate is concerned, this right is limited to the right to represent oneself pro se. There is no constitutional right to represent others in court, and plaintiffs have cited no case standing for the proposition that attorneys enjoy a First Amendment right to practice law in any court of their choosing without having first been admitted to practice there.

In short, plaintiffs have not identified any First Amendment interest that is affected by the challenged rules.

Count IV (Title. VII)

Plaintiffs ingeniously submit that the local rules violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17. Title VII protects employees from discriminatory employers. But the courts are not 'employers' of the members of their respective bars, and Title VII does not extend to 'discrimination' based upon bar membership. Title VII operates to outlaw only discrimination based upon 'race, color, sex, or national origin, 42 U.S.C. § 2000e—2. Discrimination on the basis of bar membership is, curiously, not mentioned. Plaintiffs argue that the statute should not be limited to those groups specifically enumerated, but should be read in light of its greater purpose, which plaintiffs

describe as providing 'a vessel in which the milk of employment opportunity is one that all may use without restriction.' See Plf.' Reply Mem, in Supp. of Mot. for Summ. J., at 22—23. Perhaps so, but not until Congress says so.

Count V (Equal Protection)

In Count V, plaintiffs contend that the challenged rules violate their Fifth Amendment right to equal protection. In support of an elaborate argument that the Court should apply some 'heightened level of scrutiny' to the equal protection analysis, plaintiffs rely upon decisions holding that courts may not treat residents of one state differently than those of another.

For example, in *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985), the Supreme Court held that a rule by a State Supreme Court that limited bar admission to state residents violated the Privileges and Immunities Clause of Art. IV, § 2. The Supreme Court rejected the notion that a nonresident attorney (who had by the way, passed the New Hampshire bar examination at 276) should be presumed. to be less competent or less available than attorneys who resided within the state. *Piper*, 470 U.S. at 285—86. And in *Frazier v. Heebe,* 482 U.S.641 (1987), the Supreme Court extended its reasoning in Piper to hold that a federal district court in Louisiana could not require applicants to its bar to live, or maintain an office in Louisiana. In *Frazier*, the plaintiff did 'not challenge the requirement . . . that an attorney must be a member In good standing of the Louisiana Bar.' 482 U.S. at 646 n.5.

Neither *Piper* nor *Frazier* is relevant to the present case, because 'the local rules do not treat lawyers of one state differently than those of another.' *Giannini* 711 F. Supp. at 1000. Under the local rules challenged here, all lawyers of all

states are presumably required to be members in good standing of the bar of the state in which the federal district court sits. In both *Piper* and *Frazier*, the plaintiffs were, in fact, members of the relevant state's bar and never questioned the requirement that they be so.

Despite plaintiffs' claim to be entitled to a heightened scrutiny analysis of the issue, the 'challenged rules do not involve the impairment of a fundamental right because there is no fundamental right to practice law. Further, lawyers are not a suspect class. Therefore, a rational level of scrutiny is used' in evaluating plaintiffs' equal protection claim. *See Giannini*, 911. F.2d at 359. The justifications set forth by defendants in support of the local rules 'amply satisfy the requirement of a rational basis for the classification.' *See Giannini*, 911 F.2d at. 360.[3] As a result, the challenged rules do not violate plaintifs' equal protection rights.

Count VI (Due Process)

Count VI contends that the local rules violate plaintiffs' Fifth Amendment right to due process. The Due Process Clause affords protection only to 'those property interests which are created and defined by independent sources, such as statutes, legal rules, or mutually explicit understandings.' *See Maynard v. United States Dist. Ct. for the Cent. Dist. of Cal.*, 701 F. Supp. 738, 743 (C.D. Cal. 1988) (citing *Board of Regents v. Roth*, 408 U.S..564, 569—70 (1972)), aff'd, 915 P.2d 1581 (8th Cir.1990). Plaintiffs cite no 'rule, statute, or understanding that would support their claim of denial of a property right to practice law in the district court'. See also *Matter of Roberts*, 682 F.2d 105, 107 (3d Cir. 1982). *Cf. Leis v. Flynt*, 439 U.S. 438, 443 (1979) ("The Constitution does not require that because a lawyer has been admitted to the bar of one state; he or she must be allowed to practice in another").[4] Accordingly, Count VI should be dismissed.

Count VII (Privileges and Immunities Clause)

Entitled 'Violation of Fifth Amendment Right to Property,' it is nevertheless unclear exactly what Count VII alleges. In their papers, plaintiffs contend that "an attorney's 'privilege and immunity' is constitutionally protected,' Comply. ¶ 123, and that the challenged rules 'abridge and modify the plaintiffs' property rights.' See Id. ¶ 125. Plaintiffs seem to contend that the local rules violate either the Takings Clause of the Fifth Amendment or the Privileges and Immunities Clause of Article IV, ¶ 2. Neither claim has merit.

As explained in the discussion of Count VI, supra, Plaintiffs have no 'property right' to practice law in every state and federal court they choose. Hence, the takings claim is specious.

Article IV, § 2 of the Constitution provides that the citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.' The Privileges and Immunities Clause prevents 'a State from discriminating against citizens of other states in favor of its own." *Hague v. C.I.O.*, 307 U.S. 496 (1939) (emphasis supplied). The Privileges and Immunities Clause is not a limitation on powers of the federal government. *Hawes v. Club Ecuestre El Commandante. Etc.*, 535 F.2d 140, 145 (1st Cir. .1976).

Plaintiffs cite several cases in which courts have struck down attorney admission requirements under the Privileges and Immunities Clause. *See Piper*, 470 U.S. 274. However, in each of those cases, the courts were dealing with state laws which discriminated against non—residents. Here, there is no state action; federal courts' local rules are matters of federal law. *See Snyder*, 472 U.S. 634, 645 n.6 (1985). Furthermore, the local rules at issue do not discriminate on the basis or state citizenship or residency; all attorneys, regardless of domicile, are required to be members of the bar

of the state in which the federal court sits.

Count VIII (Right to Travel)

In Count VIII, plaintiffs contend that the local rules violate their 'right to travel.' Rut here, as in *Giannini*, the 'lack of disparate treatment of non-residents or.recent arrivals eliminates the barrier to interstate travel.' *See Giannini*, 911 F.2d at 360 n.7, 357 n.5. Admission to the federal district courts is conditioned on one's having passed (or been excused from taking) the state bar examination, irrespective of one's residency. Plaintiffs' argument has been specifically rejected in several challenges to bar admission requirements. *See Hawkins v. Moss*. 503 F.2d 1171, 1178 (4th Cir. 1974); *Galahad v. Weinshienk*, 555 F. supp. 1201, 1208 (D. colo. 1983).

Count IX (Full Faith and Credit)

Plaintiffs contend that the local rules violate the Full. Faith and Credit Clause. That provision provides that 'Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.' U.S. Const. Art. IV, § 1. The claim lacks merit, since plaintiffs do not cite any 'act, record, or judicial proceeding' or any state in which they are admitted that purports to entitle them to practice law in any other state, or in any federal court. See Giannini, 911 F.2d at 360.

For the foregoing reasons, it is, this 30th day of July, 1998,

ORDERED, that Plaintiffs' motion for summary judgment is denied; and it. is

FURTHER ORDERED, that Plaintiffs' motion for case priority (13) is denied as moot; and it is

FURTHER ORDERED, that defendants' motion to dismiss the complaint (4) is granted, and this action is dismissed with prejudice, and the Clerk is directed to enter judgment for defendants and against plaintiffs, with costs.

Thomas Penfield Jackson
U.S. District Judge

FOOTNOTES

[1] Although not a plaintiff himself, plaintiffs' counsel is Joseph R. Giannini, Esq., of Los Angeles, California. Eight years ago, Mr. Giannini unsuccessfully litigated a nearly identical case pro se in California. *See Giannini v. Real*, 711 F. Supp. 992 (C.D. Cal. 1989), aff'd, 911 F.2d 354 (9th cir 1990). Mr. Giannini is a California resident who passed the New Jersey and Pennsylvania bar examinations. After failing the California bar twice, Giannini challenged the California federal district courts' local admission rules, which require membership in the State Bar of California to practice before them. *See Giannini*, 911 F.2d at 356. Mr. Giannini is not a member of the bar of this U.S. district court, and professes to be unable to retain the services of attorney who is. The Court will therefore, sup sponte, admit him pro hac vice for purposes of the instant motions.

[2] In *Giannini*, 911 F.2d 354, supra, n.1, the Ninth circuit considered and rejected the arguments underlying five of the nine counts plaintiffs allege here. Mr. Giannini urges the court to disregard the Ninth Circuit's decision, which he regards as a 'deliberate federal coverup . . . qualitatively identical to the Tailhook incident, where Naval Admirals chose to ignore unlawful conduct visited upon female officers, so as to not publicly impugn the integrity of their sons and the Navy.' See Pls. Reply Mem, in Supp. of Mot. for Summ. J., at 37-38.

[3] Defendants offer the following rational bases accepted by the Ninth Circuit in *Giannini* -- for the challenged rules: (1) district courts, having no relevant procedures of their own, rely on the state bar examination for determination of fitness to practice law; (2) questions of state substantive law permeate the range of cases over which the district courts have subject matter jurisdiction; (3) membership in the state bar provides the district courts assurance that the character, moral integrity and fitness of prospective adaittees have been approved after investigations; (4) allegations of professional misconduct can be brought to the attention of the State bar; (5) such membership helps screen applicants who are guilty of ethical misconduct in any other jurisdiction; and (6) attorneys who are members of the state and district court bars will not choose the forum for litigation on the basis of their membership in the federal bar rather than the clients' interests. *See Giannini*, 911 F.2d at 360.

[4] Plaintiffs claim that their right to practice law is a 'property' right. Citing *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), plaintiffs argue that the opportunity to practice law is constitutionally protected. But, as noted above, *Piper* is completely inapposite to the present case. The *Piper* Court, relying on the Privileges and Immunities Clause (which is inapplicable to actions by the federal government), held that in admitting attorneys to its bar, a State may not discriminate against non-residents. The Court expressly stated that it did not purport to overrule *Leis*. *See Piper*, 439 U.S. at 283 n.16.

97cv01792.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Monica M. McKenzie, et al.,

v.

William H. Rehnquist, Hon., Chief Justice of the Judicial Conference of the United States, et al.,

Filed 7/30/98

This cause having been considered by the Court on cross dispositive motions, before the Honorable Thomas Penfield Jackson, Judge presiding, and the issues having been duly briefed by all parties and the court having rendered its decision granting defendants motion to dismiss, now therefore, pursuant to the decision of the Court,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiffsMONICAM.MCKENZIE,JEFFREYL.RUSELL,ROGER LOWENSTEIN.BENITA KILCHLER, RICHARD J.PACULIAN, LUISITO L.LOPEZ, ARTHUR MINTZ, HOWARD SOBEN, JANE DOE, DAVID ZISSER take nothing on the complaint against the defendants HON.WIWAM H. REHNQUIST, HON.JLJAN R. TORRUELLA, HON.JOSEPH L. TAURO, HON. JON O.NEWMAN, HON.PETERC.DORSEY, HON DOLORSEK.SLOVITER HON. EDWARD N. CAHN, HON.J.HARVIE WILKINSON, HON.W.EARL BRITT, HON.HENRY A. POLITZ, HON.WILLIAM H. BARBOUR JR., HON.BOYCE F. MARTIN JR.. HON. THOMAS A. WISEMANJR., HON. RICHARD A. POSNER, HON. MICHAEL M. MIHM, HON.RiCHARD S. ARNOLD,

HON.I, DONALD E. O'BRIEN, HON PROCTOR HUG JR., HON.LLOYD D.GEORGE, HON.STEPHANIE K. SEYMOUR, HON.CLARRENCE A. BRIMMER, HON JOSEPH W. HATCHEIT, HON WM.TERRELL HODGES, HON HARRY T. EDWARDS, HON.JOHN GARRETT PENN, HON.GLENN L. ARCHER JR., HON. GREGORY W. CARMAN and that the said defendants have and recover costs from the said plaintiff.

NANCY MAYER-WHITTINGTON. Clerk

97cv01792.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Monica M. McKenzie, et al.,

v.

William H. Rehnquist, Hon., Chief Justice of the Judicial Conference of the United States, et al.,

Filed 12/8/98

Upon consideration of the motion of plaintiffs to vacate, alter, amend, and for a new trial, the opposition of defendants thereto, and the entire record herein, it appearing to the court that plaintiffs have not presented arguments that support alteration or amendment of the court's July 30, 1998 order, or other similar relief, it is, this day of December, 1998,

ORDERED, that motion of plaintiffs to vacate, alter, amend and for a new trial is denied; and it is

FURTHER ORDERED, that the ex parte application of plaintiffs for oral argument on their motion to vacate is denied as moot.

Thomas Penfield Jackson
U.S. District Judge

No. 99-5005

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Appellees

Febrary 29, 2000 Filed

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

5 U.S.C. § 500(b) provides,

"An individual who is a member in good standing of the highest court of any State may represent a person before an agency on filing with the agency a Declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person on whose behalf he acts." The only exception concerns patent attorneys.

28 U.S.C. § 1654

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

28 U.S.C. § 2071(a) provides,

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such [local] rules shall be consistent with Acts of Congress and rules of practice and procedure under Section 2072 of this title. (Emphasis added)

28 U.S.C. § 2072 (b) in pertinent part provides,

Such [local] rules shall not abridge, enlarge or modify any substantive right. (Emphasis added)

FRAP 46(a)provides,

"An attorney who has been admitted to practice before the Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or a United States district court (including the district courts for the Canal

Zone, Guam and the Virgin Islands), and who is of good moral and professional character, is eligible for admission to the bar of a court of appeals."

Constitutional Provisions

Article IV Section 1. [Full Faith and Credit]

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Article IV Section 2. [Privileges and Immunities]

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

First Amendment.

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

14th Amendment, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX

TABLE 1

DISTRICT LOCAL RULES THAT PROVIDE GENERAL ADMISSION RECIPROCITY

E.D. Arkansas LRB-1; W.D. Arkansas LRB-1; D. Conn. LR2; D. Hawaii LR110-1; C.D. Ill. LR83.5; N.D. Ill. LR3; S.D. Ill. LR1; N.D. Ind. LR83.5; S.D. Ind. LR83.5; E.D. Mich. LR110.1; W.D. Mich. LR16; E.D. MO. LR12.01; D. Neb. LR10-1; N.D.N.Y LR 83.1; D. N.Dak. LR79.1; N.D. Ohio LR1:5.1; E.D. Ok. LR83.3; N.D. Ok. LR83.2; W.D. Ok. LR83.3; W.D. Pa. LR83.5; D. Puerto Rico LR201; D. R.I. LR4; E.D. Tn. LR83.5; E.D. Tx. LR2; N.D. Tx. LR13.1; S.D. Tx. LR1; W.D. Tx. LRAT-1; E.D. Wisc. LR2.02; W.D. Wisc. LR1.

TABLE 2

DISTRICT LOCAL RULES THAT PROVIDE SOME FORM OF QUID PRO QUO GENERAL ADMISSION RECIPROCITY

D. Az. LR1.5(all attorneys eligible except attorneys residing in Az. or whose principal office or practice is in Az.) D. Columbia LR701(active members in good standing of the Bar of the District of Columbia, or active members in good standing of the highest court of any state in which the attorney maintains his/her principal law office and is a

member in good standing of a United States District Court that provides for reciprocal admission to members of the bar of this court; D. Maryland LR701(allows anyone to be admitted, but "no attorney . . .may be a member if the District Court for which the attorney maintain his principal law office has a local rule that denies membership. . .to a Maryland member with offices in Maryland"); E.D. and S.D. New York LR2("A member of the bar of the State of New York, or a member of the bar of the United States District Court in New Jersey, Connecticut or Vermont" which allows members of these two districts to practice there); W.D. N.Y. LR83.1(admits anyone who is a member of any district court which does not exclude its members); D. Vermont R1(admits Vermont members "or any attorney of the Bar of any District Court within the First and Second Circuits. . .")

TABLE 3

DISTRICT COURT LOCAL RULES RESTRICT GENERAL BAR ADMISSION TO ATTORNEYS FROM THE FORUM STATE

M.D. Ala. LR1; N.D. Ala. LR83.1; S.D. Ala. LR1; D. Alaska LR83.1; C.D. Ca. LR2.2; E.D. Ca. LR180; N.D. Ca. LR11; S.D. Ca. LR83.5; D. Col. LR83.5; D. De. LR83.5; M.D. Fl. LR2.01-.02; N.D. Fl. LR11.1; S.D. Fl. LR11.1; M.D. Ga. LR2; N.D. Ga. LR110; S.D. Ga. LR502/504; D. Guam LR110; D. Idaho. LR83.5; N.D. Iowa LR5; S.D. Iowa LR5; D. Kan. LR83.5; E.D. Ky. LR3; W.D. Ky. LR3; E.D. La. LR20; M.D. La. LR20; W.D. La. LR20; D. Maine LR83.1; D. Mass. 83.5; D. Mn. 83.5; N.D. Mis. LR1; S.D. Mis. LR1; W.D. Mo. LR1; D. Montana LR110; D. Nev. LR10-1; D.N.H. LR 83.1; D. N.J. LR4; D. New. Mex. LR83.2; E.D. N.C. LR2.00; M.D. N.C. LR103; W.D. N.C. LR1; D. N. Marina Islands LR83.5; S.D. Oh. LR83.4; D. Or. LR110; E.D. Pa. LR83.5; M.D. Pa. LR204; D. S.C. LR2.00; D. S.D.

LR83.2; M.D. Tn. LR1(b); W.D. Tn. LR1; D. Utah LR103-1; D. Vir. Islands LR 83.1.(1); E.D. Va. LR 83.1.(A); W.D. Va. LR 2(1); E.D. Wa. LR 2; W.D. Wa. LR83.2; N.D. W. Va. LR 2.01.; S.D. W. Va. LR 2.01-.02; D. Wy. LR 201(a);

TABLE 4

DISTRICT COURT LOCAL RULES THAT NOT ONLY RESTRICT GENERAL BAR ADMISSION TO ATTORNEYS FROM THE FORUM STATE, BUT GO FURTHER AND CATEGORICALLY RESTRICT PRO HAC VICE ADMISSION

M.D. Ala. LR1; N.D. Ala. LR83.1; S.D. Ala. LR1; D. Alaska LR83.1; C.D. Ca. LR2.2; E.D. Ca. LR180; S.D. Ca. LR83.5; D. Col. LR83.5; D. De. LR83.5; M.D. Fl. LR2.01-.02; N.D. Fl. LR11.1; S.D. Fl. LR11.1; M.D. Ga. LR2.00; N.D. Ga.LR110; S.D. Ga. LR504; D. Guam LR110; D. Mn. 83.5; N.D. Mis. LR1; S.D. Mis. LR1; D. Montana LR110; D. Nev. LR10-2; D. New. Mex. LR83.3; E.D. N.C. LR2.05; D. N. Marina Islands LR83.5; M.D. Tn. LR1(d); E.D. Va. LR 83.1.(A); W.D. Va. LR 2(1); E.D. Wa. LR 2; W.D. Wa. LR83.2;

TABLE 5

Title VII REGULATIONS

See 29 CRF § 1607-UNIFORM GUIDELINES ON EMPLOYEE SELECTION

PROCEDURES (1978)

29 CRF § 1607.1 Statement of purpose. A. Need for uniformity—Issuing agencies. The Federal government's

need for a uniform set of principles on the question of the use of tests and other selection procedures has long been recognized. The Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice jointly have adopted these uniform guidelines to meet that need, and to apply the same principles to the Federal Government as are applied to other employers.

29 CRF § 1607.1 B -- Purpose of guidelines. These guidelines incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures. . .

29 CRF § 1607.2 B -- Employment decisions. These guidelines apply to tests and other selection procedures which are used as a basis for any employment decision. Employment decisions include but are not limited to hiring, promotion, demotion, membership (for example, in a labor organization), referral, retention, and licensing and certification. . .

29 CRF § 1607-11 Disparate treatment,

. . .A selection procedure. . . . cannot be imposed upon members of a race, sex, or ethnic group where other employees, applicants, or members have not been subjected to that standard. Disparate treatment occurs where members of a race, sex, or ethnic group have been denied the same employment, promotion, membership, or other

employment opportunities as have been available to other employees or applicants.

29 CRF § 1607.3 Discrimination defined.- Relationship between use of selection procedures and discrimination.

B. Consideration of suitable alternative selection procedures. Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact.

Supreme Court, U.S.
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(3)

No. 00-149

In the

Supreme Court of the United States

MONICA M. McKENZIE, JEFFREY L. RUSSELL, ROGER LOWENSTEIN, BENITA KICHLER, RICHARD J. PACIULAN, LUISITO L. LOPEZ, ARTHUR MINTZ, HOWARD SOBEN, DAVID ZISSER,

Petitioners,

versus

Hon. WILIAM H. REHNQUIST, CHIEF JUSTICE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, Hon. JUAN R. TORRUELLA, Hon. JOSEPH L. TAURO, Hon. JON O. NEWMAN, Hon. PETER C. DORSEY, Hon. DOLORES K. SLOVITER, Hon. EDWARD N. CAHN, Hon. J. HARVIE In WILKINSON III, Hon. W.EARL BRITT, Hon. HENRY A. POLITZ, Hon. WILLIAM H. BARBOUR, JR., Hon. BOYCE F. MARTIN, JR., Hon. THOMAS A. WISEMAN, JR., Hon. RICHARD A. POSNER, Hon. MICHAEL M. MIHM, Hon. RICHARD S. ARNOLD, Hon. DONALD E. O'BRIEN, Hon. PROCTOR HUG, JR., Hon. LLOYD D. GEORGE, Hon. STEPHANIE K. SEYMOUR, Hon. CLARRENCE A. BRIMMER, Hon. JOSEPH W. HATCHETT, Hon. WM. TERRELL HODGES, Hon. HARRY T. EDWARDS, Hon. JOHN GARRETT PENN, Hon. GLENN L. ARCHER, JR., Hon. GREGORY W. CARMAN,

Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals for the District of Columbia

REPLY BRIEF

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REPLY ARGUMENT

The Court Should Grant Review Because The Judgment Entered Without An Opinion Undermines The Integrity Of The Federal Bench And Bar, And This Case Presents An Important Question Of Federal Law That Cannot Go Unanswered Without Causing Imminent Further Litigation And Dishonorable Confrontation With The Federal Judiciary

Since antiquity it has been universally accepted that "no just judge will pronounce one sort of judgment in his own case and a different one in the case of others." Seneca, Moral Essays (Loeb Classical Library 1994) Book I p. 143. This Honorable Court, in its own rules, has declared that *general* admission to its bar is open to qualified lawyers from every State. If this Honorable Court does not in its own rules discriminate favoring one State's attorneys over another's, then neither should Federal District Courts. This Honorable Court should not publicly pronounce one standard in its own rules, and by failure to act allow a different standard in Federal District Courts.

It is simply absurd to require United States District Judges to the swear to the same oath of office to uphold the same Constitution, to receive the same nationwide salary and uniform benefits, and to permit them to adopt home-town protectionist balkanized local rules, that spring directly from and abort the First Amendment guaranteed freedoms. This Court has recognized that competition in the long run increases the quality of advocacy. *FTC v. Superior Court Trial Lawyers Assn.* 493 U.S. 411, 423-24 (1989) Competition enhances performance and the presentation of new ideas. Monopolies produce inefficiency. If in the N.F.L., the New York Giants are not restricted to playing the New York Jets every week, why should federal practice lawyers in

United States District Courts be treated differently? Is competition between professional football players and interstate commerce to be judged by one standard, and competition in United States District Courts between professional members of the bar (who have a constitutional duty and obligation to vindicate federal rights) by another?

Thus, this Court should grant *certiorari* and pronounce judgment as to whether "local" rules that automatically grant *general* admission to inexperienced forum State attorneys, and automatically deny *general* admission to experienced federal practice attorneys from outside the forum State are lawful. These challenged rules are based on a blind and unthinking puffed up selfish devotion to the local bar's monopoly. If justice is a good, the reduction of access to the fountains of justice, cannot be a good. It is an evil. It is dishonorable. This Honorable Court can have no part in what is not honorable. This Honorable Court has a legal and moral duty to curb this pernicious vice.

The petitioners' have argued the challenged "local" Federal District Court rules are conspicuously outmoded and unlawful, and that their legal arguments are unanswerable. In these circumstances, joined with the specter of impropriety flowing from an appellate judgment filed without an opinion and without oral argument, the government's failure to file an Opposition Brief to this Court's granting of *certiorari*, is an admission by silence that *certiorari* should be granted. It is a maxim of law that secrecy is not congenial to truth. This Honorable Court can rest assured that if any legitimate basis existed to support the challenged discriminatory rules in a federal public forum, raised in this petition wherein CHIEF JUSTICE REHNQUIST and the United States Judicial Conference are respondents, that the Solicitor General would have offered it gladly. The Honorable Solicitor General did not attempt to defend the challenged rules because they are not defensible. This Court has already explicitly recognized that "local" rules, such as challenged here, are "difficult to justify." *Frazier v. Heebe*, 482 U.S. 641, 647 n. 7 (1987)

It cannot be denied that the challenged "local" rules defile the First Amendment. England's King George III forbid our American forefathers to speak out against his demand for taxation (without representation), and to join together and associate with other colonists, and he refused to entertain their petitions for redress of grievances. This tyranny produced the American Revolution. American citizens have formed a constitutionally based Government that has guaranteed their sacred First Amendment rights. These rights have become a monument to liberty and an exalted example for the entire world.

The First Amendment's guarantee is that American citizens have a constitutionally protected right to speak (advocate) as they think, associate with whom they choose, and "to petition the Government for redress of grievances." (emphasis added) These sovereign First Amendment rights belong to the people. These rights are at the apex of our constitutional hierarchy. They apply to ideas and people that we hate. That these challenged local Federal District Court rules either handicap or entirely ban the petitioners' exercise of their sacred First Amendment rights is incontrovertible. The petitioners' first and third- party standing to challenge the subject "local" Federal District Court rules is obvious as a neon sign on the courthouse roof saying "Negroes Not Wanted." That the petitioners, and other Americans similarly situated, do not present a "clear and present danger" that would justify this prior restraint in a federal public forum is indisputable. The Solicitor General has not denied that the challenged rules trample the textually enumerated sacred First Amendment rights, because like footprints in knee-deep snow, it is plainly obvious that they do.

This Honorable Court should not turn a blind-eye to the application of the First Amendment strict-scrutiny standard of review for regulations affecting nude-dancers wearing pasties, hate crimes such as people burning nazi crosses on other's lawns, flag-burners, abortion protestors, and cable networks peddling smut: And then permit a secret

rational basis standard for members of the bar who also have First Amendment rights. Petitioners, as mobile federal practice attorneys have a constitutional duty to vindicate federal rights and champion locally unpopular claims. They should not be compelled to secretly forfeit their First Amendment rights on crossing a State line.

Justice Brandeis, in recognizing that the law needed to be fit for its purpose, quoted a poem by James Russell Lowell,[1] that succinctly summarizes the herein challenged "feudal" rules and antiquated judicially sanctioned "feather-bedding,"

> *"New times, demand new issues and new men,*
> *The world advances, and in time outgrows the laws*
> *That in our father's time were best;*
> *And, doubtless, after us some purer scheme*
> *Will be shaped out by wiser men than we, --*
> *Made wiser by the steady growth of truth*

Likewise, it cannot be denied that that the challenged "local" Federal District Court rules disobey the command of Congress declared in *Title IV of the 1988 Judicial Improvements and Access to Justice Act* (Pub.L. 100-702). The Solicitor General has tacitly admitted that the challenged balkanized "local" rules prostrate the expressed intent of Congress that "local" rules shall be uniform; and that local rules shall not abridge, modify, or enlarge any substantive rights. See 28 U.S.C. §§ 2071-72, 331-32. The Solicitor General has not denied that the challenged balkanized rules disobey the commands of Congress because it is obvious that they do.

The respondents further have not (and cannot) deny that the challenged "local" rules are descended from the most despised decisions in the history of this Honorable United States Supreme Court. *See Dred Scott v. Sandford* 60 U.S.

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[1] Phillipa Strum, Louis D. Brandeis: Justice For The People, (1984 Random House) p. 127 (citing Lowell's "A Glance Behind The Curtain')

(19 Howard) 393 (1856); *In re Lockwood*, 154 U.S. 116 (1894)

Likewise, it cannot be denied that the challenged "local" Federal District Court rules stain the integrity of the federal bench according to the American Bar Association, the Reporter for the American Law Institute, the National Bankruptcy Review Commission, and multiple other commentators and respected arms of the bar. The Solicitor General has not denied these public denunciations because they cannot be denied.

One Washington D.C. newspaper reporter, commenting on the legal issues raised in this petition exclaimed that we have "tweaked" the Court. Not so. (At least not purposely or maliciously.) Truth is the summit of being; justice is the application of it to affairs.[2] Men of honor like to hear of their faults, so that they can correct them. The truth will set us free. Liberty and freedom is man's inalienable right. This country was born in protest. Protest is as American as the Stars and Stripes. It is enshrined in the right to advocate, associate, and "to petition the Government for redress of grievances." The petitioners here have been created equal, and they should have equal First Amendment liberties.

When the First Amendment was being ratified, and former Chief Justice Roger Brooke Taney was going to college, he walked the eighty-mile distance. It took him two weeks. In this new millennium and internet-era, the Honorable Justices serving on this consecrated Court, who serve as a the foremost example to our entire nation, cannot expect American citizens and members of the bar, to continue being treated like Dred Scott by antiquated local rules that plunder their First Amendment rights. Here, U.S. District Judges are not wearing clothes, and it is folly to suggest

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[2] Ralph Waldo Emerson, The Selected Writings of Ralph Waldo Emerson, p. 332 (1992 Modern Library Edition)(Essay on Character)

petitioners or anyone else can go on pretending these jurists are clothed.

For all of the foregoing reasons, the petitioners request this Honorable Court to grant *certiorari* review.

Dated: August 24, 2000

Respectfully submitted,
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